

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY BOSLEY,

Defendant.

NO. CR-05-0166-LRS-2

**ORDER DENYING MOTION FOR  
REDUCTION OF SENTENCE**

On January 25, 2010, Defendant Anthony Bosley filed, *pro se*, a "Petition," which the Court construes as a motion for reduction in sentence pursuant to 18 U.S.C. §3582(c)(2), based on an amendment to the Sentencing Guidelines which lowered the base offense levels applicable to cocaine base ("crack") offenses. On February 26, 2010, the government filed a timely response to the Court's Order Setting Briefing Schedule, Ct. Rec. 101. The government asserts, and the Court agrees, that Defendant has no right to personally appear before this Court in connection with his motion for reduction of sentence, filed pursuant to Section 3582(c).

**DISCUSSION**

Mr. Bosley was charged by Indictment return on September 20, 2005,

1 with Count 1, Conspiracy to Distribute 50 Grams or More of Cocaine Base,  
2 Count 2, Distribution of 5 Grams or More of Cocaine Base, Count 3,  
3 Possession with Intent to Distribute 50 Grams or More of Cocaine Base.  
4 Ct. Rec. 16. On October 5, 2005, the United States filed an Information  
5 to Establish Prior Conviction for purposes of enhancing the Defendant's  
6 sentence pursuant to 21 U.S.C. § 851. Ct. Rec. 33.

7 Mr. Bosley pleaded guilty to Count Three of the Indictment on  
8 February 16, 2006 under a written Fed. R. Crim. P. Rule 11(a)(2) plea  
9 agreement. Ct. Rec. 59. The plea agreement included a stipulation by the  
10 defendant that he possessed with the intent to distribute 50 grams or  
11 more of cocaine base, thus triggering the statutory mandatory minimum and  
12 resulting in an applicable offense level of 32. See, 21 U.S.C. §  
13 841(b)(1)(A)(iii). The parties also stipulated and agreed to 2 level  
14 increase due to possession of a firearm, and a 3 level reduction if the  
15 Defendant followed through with a timely acceptance of responsibility,  
16 leaving the final adjusted offense level at 31. Ct. Rec. 59, at 9-10.  
17 The Defendant's Criminal History and whether a Career Offender Adjustment  
18 applied were left open pending completion of a Presentence Investigative  
19 Report by U.S. Probation Services. Ct. Rec. 59, at 10.

20 The Plea Agreement also included provisions by which the United  
21 States would not seek more than one enhancement under 21 U.S.C. §851 and  
22 §841(b)(1)(A)(viii), though the Defendant stipulated that he was eligible  
23 for such an enhancement. Ct. Rec. 59, at 8-9). The Defendant further  
24 stipulated that he "acknowledges that he can not be sentenced to less  
25 than twenty (20) years by operation of this enhancement." Ct. Rec. 59,  
26 at 11. Based on of those provisions, Mr. Bosley was spared the

1 possibility of a mandatory life sentence that could have resulted from  
2 more than one §851/§841 enhancement. Ct. Rec. 59, at 9.

3 The Court ordered a Presentence Investigation Report which was  
4 prepared by U.S. Probation Services. On May 12, 2006, the Mr. Bosley  
5 filed his Objections to the Presentence Report and Sentencing Memorandum.  
6 Therein he objected to "the assumption that the statutory minimum  
7 mandatory sentence in this case is twenty (20) years" because the cocaine  
8 base in question "was not tested to determine if it was smokeable," (Ct.  
9 Rec. 73, at 1). On June 1, 2006, the United States filed its Response to  
10 Defendant's Objections to the PSR and Sentencing Memorandum. Ct. Rec.  
11 75. In that response, the United States noted that "based upon the  
12 operation of the mandatory minimums and enhancements in this case, [the  
13 Defendant's] guideline range becomes 240 months as recommended within  
14 the PSR." Ct. Rec. 75, at 3. On June 5, 2006, Mr. Bosley filed a Notice  
15 of Withdrawal of Objection to Presentence Report, in which he  
16 acknowledged "that a mandatory minimum sentence of twenty years applies  
17 in this case due to the filing of the 21 U.S.C. §851 notice." Ct. Rec.  
18 76, at 1.

19 On June 14, 2006, the Court filed Judgment, adopting the Presentence  
20 Investigation Report "without change," and imposed the mandatory minimum  
21 sentence of 240 months. Ct. Rec. 79. Mr. Bosley appealed his conviction  
22 to the Ninth Circuit Court of Appeals. Ct. Rec. 82. The Circuit Court  
23 affirmed his conviction and sentence. Ct. Rec. 92. *United States v.*  
24 *Bosley*, 232 Fed. Appx. 638 (9th Cir. 2007), *cert. denied*, 552 U.S. 923  
25 (2007).

1 On October 6, 2008, Petitioner Bosley filed a 28 U.S.C. § 2255  
2 Motion to Vacate, Set aside or Correct sentence . The Defendant directly  
3 attacked his sentence and raised the issue of crack versus cocaine  
4 disparity, relying upon the decision of *Kimbrough v. United States*, 128  
5 S.Ct. 558 (2007). Ct. Rec. 98. This Court denied Mr. Bosley's petition  
6 by written order March 19, 2009. Ct. Rec. 99.

7 Mr. Bosley appears to be requesting the Court to reduce his sentence  
8 based on the application of 18 U.S.C. § 3582(c)(2), and further, on  
9 Section 1B1.10 of the Sentencing Guidelines. Section 1B1.10 identifies  
10 the amendments which may be applied retroactively. The amendment in  
11 question in this matter is Amendment 706, effective November 1, 2007,  
12 which reduced the base offense level for most cocaine base ("crack")  
13 offenses. On December 11, 2007, the Sentencing Commission added  
14 Amendment 706 to the list of amendments stated in Section 1B1.10(c) which  
15 may be applied retroactively, effective March 3, 2008. The final result  
16 of the amendment, is a reduction of two levels for each of the ranges set  
17 in the guidelines for crack offenses. However, this guideline reduction  
18 has no statutory impact.

19 The Sentencing Commission has not altered a statutory mandatory  
20 minimum sentence, and that mandate continues to apply. See § 1B1.10  
21 app. note 1(A) (affirming that "a reduction in the defendant's term of  
22 imprisonment is not authorized under 18 U.S.C. § 3582(c) and is not  
23 consistent with this policy statement if . . . an amendment does not have  
24 the effect of lowering the defendant's applicable guideline range because  
25 of the operation of . . . another statutory provision (e.g., a statutory  
26 mandatory minimum term of imprisonment."). The Ninth Circuit follows the

rule provided in § 5G1.1(b) of the Guidelines - that where criminal liability is greater under the statutory minimum than under the Sentencing Guidelines, the statutory minimum sentence controls. *United States v. Van Doren*, 182 F.3d 1077, 1083 (9th Cir. 1999) (acknowledging that U.S.S.G. § 5G1.1(b) provides: "Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."). Indeed, case law from other circuit courts have recognized, where a statutory mandatory minimum sentence is applicable, the passage of a retroactive guideline amendment is irrelevant. *See, e.g., United States v. Dimeo*, 28 F.3d 240, 241 (1<sup>st</sup> Cir. 1994); *United States v. Hanlin*, 48 F.3d 121, 124-25 (3d Cir. 1995); *United States v. Pardue*, 36 F.3d 429 (5th Cir. 1994); *United States v. Marshall*, 95 F.3d 700, 701 (8th Cir. 1996); *United States v. Mullanix*, 99 F.3d 323, 324 (9th Cir. 1996); *United States v. Smarted*, 129 F.3d 539, 542 (10th Cir. 1997); *United States v. Eggersdorf*, 126 F.3d 1318, 1320 (11th Cir. 1997).

In this case, Mr. Bosley pleaded guilty and stipulated that he possessed with the intent to distribute 50 grams or more of cocaine base, triggering the statutory mandatory minimum. Additionally, the Defendant stipulated and agreed to the application of the one 21 U.S.C. § 851 enhancement which changed his mandatory minimum sentence to twenty years, by statute. Thus, the application of Amendment 706 to the guidelines has no impact on Mr. Bosley's sentence. His statutory mandatory minimum still applies and controls the sentence.

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1       **IT IS HEREBY ORDERED that** Defendant's "Petition," which the Court  
2 construes as a motion for reduction in sentence pursuant to 18 U.S.C.  
3 §3582(c), **Ct. Rec. 100**, filed January 25, 2010, is **DENIED**.

4       **IT IS SO ORDERED.** The District Court Executive is directed to enter  
5 this order and to provide copies to counsel and Defendant Bosley.

6       **DATED** this 10<sup>th</sup> day of May, 2010.

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8                                   *S/ Lonny R. Suko*

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10                                  LONNY R. SUKO  
11                                  Chief United States District Judge  
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